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No. 82-1965

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCES WYNSHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of the decision of the court of appeals affirming a federal income tax assessment against her in the amount of $9,619.64.

1. a. In October 1973, a joint federal income tax return for the calendar year 1972, purportedly signed by petitioner and her then husband, David Wynshaw, was filed with the Internal Revenue Service (Pet. App. 21, 25). That return reported an outstanding tax liability of $10,368.65; however, no payment was enclosed with the return (*id.* at 21).[1] On January 7,

[1] The disparity between this $10,368.65 figure and the $9,619.64 claimed by the government is due to certain additional deductions allowed by the Service in recomputing the tax on the 1972 return (Pet. App. 21).

1974, this outstanding amount was assessed against petitioner and her husband on the basis of the joint return (*ibid.*). On October 14, 1976, a statutory notice of deficiency for four tax years, including 1972, was mailed to petitioner and her husband. This notice alleged, *inter alia*, that petitioner and her husband had underreported their 1972 taxable income by more than $117,000 and were thus jointly liable for an additional $76,727 in federal income taxes for that year (*id.* at 21-22).

On January 3, 1977, petitioner and her husband filed a petition with the Tax Court for a redetermination of the asserted deficiencies. Petitioner invoked the "innocent spouse" provision of the Internal Revenue Code, 26 U.S.C. 6013(e) (Pet. App. 22-23). That statute provides relief to a spouse who has signed a joint return but in so signing did not know (and had no reason to know) of any failure to report gross income on the return.[2] The statute, however, does not operate to relieve the "innocent spouse" of the liability actually set forth on the return signed and filed by such "innocent spouse." Consistent with her claim of "innocent spouse" status, petitioner did not allege that the signature on the 1972 return was forged or

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[2] Section 6013(e) of the Code (26 U.S.C.) provides that if "a joint return * * * made * * * for [a] taxable year" fails to report "25 percent of the amount of gross income stated in the return" and "the other spouse establishes that in signing the tax return he or she did not know of, and had no reason to know of, such omission," and "taking into account whether * * * the other spouse significantly benefited directly or indirectly from the items omitted from gross income * * * it is inequitable to hold the other spouse liable for the deficiency," he or she "shall be relieved of liability * * * to the extent that such liability is attributable to such omission from gross income."

in any sense unauthorized, or that the return was not in fact a joint return. To the contrary, she stated (*id.* at 23-24; emphasis added):

> The Petitioner, Frances Wynshaw, was innocent of such omissions, if any, and *in signing the returns* for the years in question had no reason to know of such omissions.

On August 21, 1979, petitioner, her husband and the Commissioner entered into a stipulated decision in the Tax Court. With respect to the 1972 return, the Commissioner conceded that petitioner was not liable for any "deficiencies," *i.e.*, any tax liability over and above that shown on the joint return for 1972. In addition, David Wynshaw stipulated that he was liable for the full amount of the deficiency and for the fraud penalty (Pet. App. 24). The liability under this stipulation was calculated on the same basis as that on which the return had been filed, *viz.*, married taxpayers filing a joint return (*id.* at 27).

b. The government filed suit in the United States District Court for the Southern District of New York on January 2, 1980, to reduce to judgment the assessments against petitioner's husband pursuant to the decision of the Tax Court and to reduce to judgment the January 7, 1974, assessment against petitioner and her husband jointly on the basis of the liability shown on the 1972 return as filed, which had never been paid (*id.* at 24). Petitioner contended that she was not liable for the 1974 assessment on the ground that the signature on the 1972 tax return was not hers and had not been authorized. The district court granted the government's motion for summary judgment (Pet. App. 31-45; 516 F. Supp. 785). The court concluded that the Tax Court's acceptance of the 1979

stipulation was a judgment deciding the " 'entire gamut of possible issues that [control] the determination of the amount of tax liability for the year in question' " (Pet. App. 42-44; citation omitted).

Although it disagreed with the district court's analysis, the court of appeals affirmed on other grounds (Pet. App. 19-28; 697 F.2d 85). The court held that the doctrine of equitable estoppel precluded petitioner from disputing her liability (Pet. App. 26). The court explained that the Tax Court judgment in favor of the government was lower than it would have been had petitioner asserted in the first instance that she never signed the 1972 return, because the government relied on petitioner's statement that she had signed the return and thus treated the return as a joint return, resulting in less tax (*id.* at 27-28).

Petitioner filed a petition for rehearing contending that she had additional evidence to submit to show that, prior to the termination of the Tax Court proceeding, her attorneys had informed an attorney representing the Commissioner of their doubts that the signature on the 1972 return was actually hers. Together with her petition for rehearing, petitioner filed a motion for leave to file affidavits to this effect. The court of appeals denied both petitioner's post-decisional motion and her petition for rehearing (Pet. App. 15-18).

2. Petitioner contends (Pet. 11-13b) that the court of appeals erred in denying the post-decisional motion and her petition for rehearing. This contention is without merit. The court of appeals' decision is correct, and no issue is presented that warrants review by this Court.

As the court of appeals held (Pet. App. 26), petitioner is estopped from contending that she did not

sign the 1972 tax return. In tax cases, the doctrine of estoppel applies when "[t]he taxpayer, by his conduct, which includes language, acts or silence[,] knowingly makes a representation or conceals material facts which he intends or expects will be acted upon by taxing officials in determining his tax." *Robinson* v. *Commissioner*, 100 F.2d 847, 849 (6th Cir.), cert. denied, 308 U.S. 567 (1939); cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61-62 (1934).[3] These criteria are fully satisfied in this case.

In accepting petitioner's "innocent spouse" defense in 1977, the Commissioner clearly relied on petitioner's 1977 statement that she had signed the 1972 return. In computing her husband's tax liability for 1972, the Service calculated the liability on the tax rates for married individuals filing jointly, the same rates used on the return filed for that year. If the tax computation had been based upon the rates for married individuals filing separately, as would have been proper if petitioner had not signed or authorized the return, the Tax Court decision, including fraud penalties, would have been greater than that computed. Compare Section 1(a) with Section 1(d) of the Internal Revenue Code of 1954 (26 U.S.C., 1970 ed.); see Pet. App. 27-28. Thus, even if it is true,

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[3] This Court noted in *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895):

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

as petitioner now claims, that she did not sign the 1972 return, she made a material representation of fact in her 1977 petition upon which the Commissioner relied to his detriment. Furthermore, the fact that her attorneys might have stated to government attorneys that the signature on the return might not have been hers does not alter the overriding fact that she expressly alleged the opposite in her formal pleadings during the Tax Court proceedings, and that the Tax Court's decision was based on that representation. Accordingly, the court of appeals correctly affirmed the judgment of the district court and denied her petition for rehearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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